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No. 91-697

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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DIAL INFORMATION SERVICES CORPORATION OF NEW YORK, ET AL., PETITIONERS

*v.*

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether 47 U.S.C. 223(b) and (c) (Supp. I 1989), which restrict the manner in which indecent commercial telephone communications may be made available to the public, are unconstitutional on their face under the First Amendment.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 938 F.2d 1535. The opinion of the district court (Pet. App. 24a-64a) is reported at 742 F. Supp. 1255.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 67a-68a) was entered on July 15, 1991. A petition for rehearing was denied on September 3, 1991 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on October 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 126-131 (1989), this Court invalidated a categorical statutory prohibition on indecent commercial telephone messages, commonly known as "dial-a-porn." The Court explained that the statute had not been shown to be "a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages." *Id.* at 131.

Congress responded by enacting 47 U.S.C. 223(b) and (c) (Supp. I 1989), a statute that permits distribution of dial-a-porn to adults but mandates procedures calculated to deny access to children.[1] Section 223(b)(2)(A) prohibits the transmission over the telephone of "any indecent communication for commercial purposes," where the communication is "available to any person under 18 years of age or to any other person without that person's consent." Section 223(b)(3) recognizes a defense, however, for those providers who "restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the [Federal Communications] Commission may prescribe by regulation."

In pertinent part, subsection (c) states that a common carrier that "collects from subscribers an identifiable charge" for indecent communications "that the carrier remits, in whole or in part, to the provider of such communication" shall not provide access to such communication "from the telephone of any subscriber who has not previously requested" such access

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[1] All citations to this statute in the remainder of this brief are to the 1989 Supplement to the United States Code.

"in writing." 47 U.S.C. 223(c)(1). To comply with this "presubscription requirement," a telephone company must either refrain from furnishing billing services to dial-a-porn providers, effectively requiring the providers to employ other means of collecting fees for their messages, or limit access to indecent communications to those persons who have previously made a written request for access.

The Federal Communications Commission has promulgated regulations (Pet. App. 71a-72a) that also specify requirements for the safe harbor provided by 47 U.S.C. 223(b)(3). Under the FCC regulations, a dial-a-porn provider must (1) notify the telephone company in writing that the provider's messages include indecent material, and (2) require payment by credit card, employ access or identification codes, or scramble its messages. *Ibid.* In *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866 (1991) [hereinafter *Information Providers*], the Ninth Circuit upheld the statute and implementing regulations against constitutional challenges substantially identical to those advanced in this case. (The regulations are not at issue in this case, since this case was commenced in the district court, and the courts of appeals have exclusive jurisdiction to determine the validity of FCC regulations. 28 U.S.C. 2342(1); see Pet. App. 28a.)

2. Petitioners are companies that provide commercial telephone messages having, "exclusively or in part, a sexually explicit content" (Pet. App. 24a). They allege that Sections 223(b) and (c) are unconstitutional on their face with respect to nonobscene, but indecent, telephone communications. On petitioners' motion, the district court granted a preliminary injunction against enforcement of the statute. Pet. App. 22a-23a.

The district court acknowledged that the statute's declared purpose—the protection of "the psychological well-being of minors"—is "a compelling interest" that "justifies a restriction on indecent speech." Pet. App. 34a. The court ruled, however, that there was a likelihood that petitioners would prevail on their contention that Section 223(c)'s presubscription requirement is not the "least restrictive means" of advancing that interest. Pet. App. 45a-46a. The court found no evidence "to contradict the proposition" that "voluntary blocking"—a procedure by which a subscriber may request the telephone company to block all calls from his telephone to telephone prefixes reserved for indecent telephone messages—"is adequately protective of children and is less restrictive than either a presubscription requirement or an independent billing mechanism." *Id.* at 41a.

The court also ruled that petitioners were likely to prevail on their contentions that Section 223(b)'s prohibition on "indecent" communications is "too vague to pass constitutional muster" (Pet. App. 55a), and that the statute's presubscription requirement is an unconstitutional "prior restraint" (*id.* at 63a). With respect to the latter ground, the court reasoned that Section 223(c) obligates telephone companies to "evaluate the speech" of information providers seeking access to the companies' billing services and to require those providers "utilizing indecent speech to utilize pre-subscription or an independent billing mechanism." Pet. App. 57a. Thus, the court concluded, the statute involves action "prior" to indecent telephone communications and operates as a "restraint" on those communications. *Id.* at 58a.

3. The court of appeals reversed. Pet. App. 1a-21a. The court first held that the statute, as con-

strued by the FCC, "is sufficiently defined to provide guidance to 'the person of ordinary intelligence' in the conduct of his affairs." *Id.* at 14a. The court noted that the FCC interpreted the statute in the course of notice-and-comment rulemaking to encompass "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." *Id.* at 13a (quoting In re *Regulations Concerning Indecent Communications by Telephone*, 5 F.C.C. Rcd 4926, 4927 ¶ 12 (June 29, 1990) [hereinafter *Report and Order*]). Relying on *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court found that the Commission's definition was entitled to deference. The court also relied on this Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 731-732 (1978), which sustained a substantially identical definition of indecent material in the context of broadcasting. Pet. App. 13a.

The court of appeals also reversed the district court's determination that voluntary blocking would be an effective, but less restrictive, means of protecting children from indecent telephone communications. The court concluded that "voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn billed by the telephone company as would the presubscription requirement of [47 U.S.C. 223(c)]." Pet. App. 15a. In support of that determination, the court noted that although blocking had been available for over two years in the New York area, "only four percent of the 4.6 million residential telephone lines in the area * * * have been blocked." *Ibid.* According to one study, the court continued, "half of the residential households in

New York are not aware of either the availability of dial-a-porn or of blocking." *Id.* at 16a.

Citing evidence that children may suffer "serious psychological damage" before their parents become aware from a telephone bill that they have been exposed to dial-a-porn, the court also observed that "[c]ommon sense dictates that a presubscription requirement * * * is more likely" to prevent access to dial-a-porn by children "than blocking after one or more occasions of access." Pet. App. 16a. "It always is more effective," the court stated, "to lock the barn *before* the horse is stolen." *Ibid.* (emphasis in original). The court of appeals held, accordingly, that "[t]o the extent that the district court found that voluntary blocking was not ineffective" in preventing access to indecent messages by children, "its finding was clearly erroneous." *Id.* at 17a.

Finally, the appeals court held that 47 U.S.C. 223(b) and (c) do not impose an unconstitutional prior restraint on indecent telephone messages. The court explained that the statute does not involve any effort by the *government* to approve or enjoin speech in advance, since, as construed by the FCC, it "requires no one except dial-a-porn providers to classify their messages." Pet. App. 20a. In addition, the court continued, a telephone company is not engaged in state action when it complies with the restrictions mandated by the statute; because "[t]he telephone company does not act under governmental compulsion either when it undertakes or refuses to undertake dial-a-porn billing, * * * it cannot be a state actor when it implements a presubscription billing system." *Id.* at 20a-21a. In any event, the court concluded, "[a] requirement that one desiring access make an advance request therefor simply does not constitute a prior restraint." *Id.* at 21a.

## ARGUMENT

1. As petitioners acknowledge (Pet. 16-17), the Second Circuit's decision in this case is consistent with the only other decision to address the constitutionality of 47 U.S.C. 223, *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866 (9th Cir. 1991). There is no conflict, moreover, between the decision in this case and *Fabulous Associates, Inc.* v. *Pennsylvania Public Utility Comm'n*, 896 F.2d 780 (3d Cir. 1990). See Pet. 16-17.

In *Fabulous Associates*, the Third Circuit struck down a Pennsylvania statute that prohibited dial-a-porn providers from making their messages available to persons who had not obtained a numerical access code, holding that that procedure was not the least restrictive alternative available to shield minors from indecent telephone communications. 896 F.2d at 788. The Third Circuit did not suggest that a presubscription requirement of the sort at issue in this case would be subject to the same objection, noting that it was "intimat[ing] no opinion on the constitutionality of" a presubscription requirement or voluntary blocking. *Id.* at 787 n.6. Indeed, the Third Circuit ultimately invalidated the access code requirement on the ground that a presubscription requirement or voluntary blocking would be less restrictive than mandatory access codes. *Id.* at 787-788.

As even the district court in this case recognized (Pet. App. 36a), *Fabulous Associates* "did not evaluate the comparative restrictiveness" of the statutory presubscription procedure in relation to voluntary blocking. There is, therefore, no inconsistency between the Third Circuit's reasoning and the Second Circuit's decision here.

2. The court of appeals' conclusion that 47 U.S.C. 223 is constitutional is well founded.

a. As this Court recently reaffirmed in *Sable*, 492 U.S. at 126, the government has a compelling interest in protecting the physical and psychological well-being of minors. That interest "extends to shielding minors from the influence of literature that is not obscene by adult standards," and laws calculated to advance it are constitutional as long as they are "carefully tailored" to that end. *Ibid.* When applying this familiar standard, a court must do more than consider whether there is an alternative means of regulation that imposes a lesser burden on protected speech. The court must also assess whether the alternative is as effective in furthering the compelling interest in question. In *Sable*, for instance, this Court's holding—that a categorical prohibition on dial-a-porn was not a narrowly tailored means of protecting children—was contingent upon the existence of other "extremely effective" alternatives (*id.* at 130-131 (footnote omitted)):

> For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.

The court of appeals faithfully applied the same analytical approach when it concluded that voluntary blocking, although it might be the "least economically restrictive * * * means of regulation," was

not "an effective means" of accomplishing the congressional purpose of denying children access to dial-a-porn. Pet. App. 17a. Contrary to petitioners' contention (Pet. 12), the court's reasoning did not shift the burden of proof on the availability of less restrictive alternatives, nor did it improperly disregard the district court's factual findings. Applying the appropriate standard of appellate review, the court simply found that the district court's finding that voluntary blocking would be effective was clearly erroneous. Pet. App. 17a.

The court of appeals' determination was fully justified. As the court noted (Pet. App. 15a), the record establishes that, even after voluntary blocking had been available in the New York area for two years, only 4% of the area's residential telephone lines had been blocked. The remaining 96% were still available to minors seeking access to indecent messages. That state of affairs did not result from voluntary choices by parents; "half" of the residential households in New York "are not aware of either the availability of dial-a-porn or of blocking." *Id.* at 16a. This evidence—as well as common sense and the truism that "[i]t always is more effective to lock the barn *before* the horse is stolen," *ibid.*—underlay the court's conclusion that "[v]oluntary blocking simply does not do the job of shielding minors from dial-a-porn." *Id.* at 17a. There is no merit to petitioners' suggestion (Pet. 14-15) that the court of appeals was moved by its own predilections, rather than by an appropriate analysis of the relevant materials.

The court's conclusion that voluntary blocking is ineffective is also consistent with the conclusion of the FCC, the agency charged with promulgating regulations to supplement 47 U.S.C. 223. In its

rulemaking proceeding, the FCC determined that "voluntary blocking by itself does not substantially eliminate calls to indecent message providers by children." *Report and Order*, 5 F.C.C. Rcd at 4928 ¶ 21. That is so, the Commission found, because voluntary blocking does not take account of the likelihood that "most parents would not realize the need for blocking until their children had already obtained access to indecent messages," and "neighbors or relatives where children are only occasional visitors" would not "recognize the need to, nor act to, have access blocked." *Id.* at 4928 ¶ 18. The Ninth Circuit upheld the Commission's conclusion that voluntary blocking would not be an effective means of shielding children from dial-a-porn. *Information Providers*, 928 F.2d at 873-874.

b. The court of appeals was also correct in concluding that the statutory prohibition on "indecent" telephone communications is not unconstitutionally vague. Due process requires that a statutory prohibition be "clearly defined," *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972), but "mathematical certainty" is unattainable, *id.* at 110, and "due process does not require 'impossible standards' of clarity." *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). It is sufficient, therefore, that a statute "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108.

As the court of appeals noted, the FCC has defined telephone indecency as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." Pet. App. 13a (quoting *Report and Order*, 5 F.C.C. Rcd at 4927 ¶ 12). This definition parallels the one that this Court upheld in *Pacifica* with respect to broad-

casting. See 438 U.S. at 731-732. Thus, by the time Congress enacted the statute at issue, the term "indecent" had "a judicially recognized meaning that is not unconstitutionally vague." *Information Providers*, 928 F.2d at 874. *Pacifica* forecloses any contention that the concept of indecency is constitutionally deficient in the context of telephone communications. "If the indecency definition passes the void-for-vagueness test for persons of ordinary intelligence who broadcast radio communications, it certainly must pass the same test for those persons who offer indecent communications over the telephone line." *Information Providers*, 928 F.2d at 875.

Contrary to petitioners' contention (Pet. 19-20), nothing in *Sable* casts any doubt on this reasoning. *Sable* did recognize that there are distinctions between the telephone and broadcast media. Specifically, the Court noted that "broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.'" 492 U.S. at 127. But those distinctions are material only to the type of regulation that may constitutionally be employed to restrict access to indecent material; they do not make it more difficult to determine what material is indecent.[2]

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[2] In fact, the statute at issue in *Sable* was challenged on grounds of vagueness. See 88-515 & 88-525 Br. for Appellant/Cross Appellee Sable Communications of Calif., Inc., at 32-37. As the Ninth Circuit recognized, by failing to address that challenge while at the same time endorsing narrowly tailored efforts to regulate dial-a-porn, this Court in *Sable* strongly suggested that "the term 'indecent' as interpreted by the Commission is not per se void for vagueness." *Information Providers*, 928 F.2d at 874. Like this case, *Sable* involved

c. The statute does not absolutely prohibit the distribution of any particular indecent message. Rather, it provides that *if* the telephone company collects fees for those providing indecent messages and if it is technologically feasible, the telephone company may not provide the messages to persons who have not requested access in advance. This procedure entails no prior restraint on speech.

In the first place, the presubscription requirement is not the kind of "restraint" at which the prior restraint doctrine is directed. That requirement is applicable only when telephone companies make billing services available to providers of indecent telephone messages and those providers choose to take advantage of them; even then, the presubscription requirement is satisfied by a written request from a person wishing to receive indecent messages. In terms of its tendency to inhibit speech, the presubscription requirement

> is conceptually no different from requesting access to a periodical by subscription, requesting admittance at a box office to an adult movie or requesting a copy of an adult magazine kept under the counter in a plain brown wrapper at the convenience store.

*Information Providers*, 928 F.2d at 878. Presubscription is not the equivalent of a prior injunction against speech or other similar legal prohibitions triggering the constitutional prohibition on prior restraints.

In any event, any restraint on speech that flows from the statute is not due to governmental action. The presubscription requirement comes into play only

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a statute providing for criminal sanctions. See 492 U.S. at 120.

if the carrier collects "an identifiable charge" that it then remits, "in whole or in part," to the dial-a-porn providers. 47 U.S.C. 223(c)(1). See *Information Providers*, 928 F.2d at 872, 877. That requirement is the result of the telephone company's choice to provide billing and collection services, and the dial-a-porn provider's decision to employ them, rather than governmental action. See *Information Providers*, 928 F.2d at 877.[3]

Finally, the statute does not require carriers to "classify which services are indecent." Pet. 23. On the contrary, the dial-a-porn provider must notify the carrier that his service is encompassed by the statute in order to invoke the presubscription safe harbor. The placement of that burden is implicit in 47 U.S.C. 223(c)(2)(B), which contemplates that a provider will make a "representation" regarding the applicability of the statute to his messages. As the appeals court noted in this case (Pet. App. 20a), this is also the FCC's interpretation of the statute. See *Report and Order*, 5 F.C.C. Rcd at 4931 ¶ 36. Plainly, the decision by private dial-a-porn providers to avail themselves of the presubscription safe harbor by identifying their messages as covered by the statute is not state action.

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[3] Petitioners contend (Pet. 22) that state action is present, at least in New York, because but for the statute, state public service commission rules would prohibit telephone companies from imposing a presubscription requirement. The fact that state law may require telephone companies to provide specified services unless federal statutes require otherwise does not convert those companies into federal actors when they comply with federal law. In any event, the interplay between New York's law and 47 U.S.C. 223(c) is not an issue of general importance calling for this Court's attention.

## CONCLUSION

The petition for for a writ of certiorari should be denied.

Respectfully submitted.

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